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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

APR 18 2006

File: WAC 01 278 51678

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

for Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in California in March 1996. It is engaged in the export and sale of automobiles and automobile parts. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been employed by the overseas company in an executive or managerial capacity. The director also determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the director's decision is in error and that the beneficiary's position of manager of the service department is within the definition of manager as set forth in the statute and regulations.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary was employed in a managerial or executive position for the overseas entity for one year prior to entering the United States as a nonimmigrant.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It appears from the record that the petitioner is claiming the beneficiary will be engaged in both managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. However, it must be noted that a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity and the statutory definition for managerial capacity if it is representing the beneficiary is both an executive and a manager. The petitioner may not claim a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner initially stated, through its attorney, that the beneficiary "began his career with [the overseas entity] in December of 1996" and that "[the overseas entity] have [sic] benefited from [the beneficiary's] experience in the repair and administration of automobiles and technical service." Counsel also indicated that at the time the beneficiary was transferred to the United States, the beneficiary had proven himself in the position of general manager. Counsel states that in the position of general manager, the beneficiary's duties "involved supervision of service operation and the hiring and firing of employees."

The director requested further evidence of the beneficiary's managerial or executive duties for the foreign company. The director also requested a copy of the foreign company's organizational structure including the beneficiary's position within the foreign organization and the beneficiary's subordinate employees.

In response, the petitioner stated that the beneficiary had two years of experience as a general manager in the industry. The petitioner also referred to a copy of a letter submitted in support of the beneficiary's nonimmigrant, intracompany transferee (L-1A) petition. The letter in support of the L-1A petition indicated that the beneficiary had been responsible for all aspects of the company's business (referring to the foreign entity), including sales, finances, and administration and for

overseeing the activities of the company concerning the United States. The petitioner's letter also indicated that the beneficiary had authority to hire and fire employees. The organizational chart of the overseas entity depicted a president, a manager, a salesman, and an administrative assistant. The beneficiary was not identified on the chart.

The director noted that the petitioner had not identified the beneficiary on the overseas entity's organizational chart. The director determined that, even if the beneficiary had been employed as the manager overseas, the beneficiary had not supervised professional employees. The director also noted the petitioner's vague description of the beneficiary's duties for the overseas employer. The director concluded that the petitioner had not submitted sufficient information to establish that the beneficiary was employed as a manager abroad.

On appeal, counsel for the petitioner appears to assert that the beneficiary was a functional manager for the overseas entity. Counsel asserts that "locating new contractors/employees, negotiating contracts, managing marketing and pricing, and supervising financial matters, planning policies and reporting to the headquarters in Japan are . . . reasonable functions for companies of this size and nature." Counsel also cites an unpublished decision that refers to the payment of contractors as payment to staff. Counsel finally indicates that the beneficiary's duties for the petitioner are similar and complementary to the duties the beneficiary performed for the overseas entity, perhaps inferring that the description of the beneficiary's duties for the United States petitioner is also applicable to the overseas entity.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). As noted by the director, the petitioner's description of the beneficiary's duties is vague. The initial description, indicating that the beneficiary's position involved supervision of service operations and included hiring and firing of employees, does not provide any information that would distinguish the beneficiary's position from that of a first-line supervisor. The description in response to the director's request for evidence indicates that the beneficiary is involved in all aspects of the overseas entity's business. This general statement does not convey an understanding of the beneficiary's day-to-day duties for the overseas entity. Review of the overseas entity's organizational chart, does not further enlighten the Bureau regarding the beneficiary's actual duties. As noted by the director, the beneficiary is no longer included on the chart but even assuming the beneficiary was the general manager, the beneficiary's position appears to be that of a first-line supervisor.

On appeal, counsel provides further duties for the beneficiary for the overseas entity and then asserts that these duties are reasonable functions for the overseas entity. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, counsel does not provide documentary evidence that the beneficiary is managing the purported functions through the work of others, rather than performing the functions himself. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, counsel's citation to an unpublished case referring to the payment of contractors as payment to staff does not appear relevant to this case. Counsel does not indicate why the unpublished case is analogous to the case at hand. Specifically, neither counsel nor the petitioner indicates that the overseas entity employed contractors or provides documentary evidence of the employment of contractors. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c). Lastly, as will be discussed below, the petitioner's description of the beneficiary's duties for the United States entity is also deficient. Even if the beneficiary's duties for the overseas entity were similar or the same as the duties for the United States petitioner, the description and supporting documentation fail to establish that the beneficiary's position was in a managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a managerial or executive capacity for the petitioner.

The petitioner, through its counsel, initially stated that the beneficiary had served the petitioner in the capacity of general manager since his transfer in May 1999. Counsel indicated that the beneficiary "manages the service operations of the company," and "[the beneficiary] supervises and controls the work of employees at [the petitioner], and he has the authority to hire, fire, or promote employees."

The director requested a more detailed description of the beneficiary's duties for the petitioner including a percentage of time spent on each of the duties. The director also requested a copy of the petitioner's organizational chart showing the

beneficiary's position and a list of all employees supervised by the beneficiary and how the employees were compensated. The director further requested a copy of the petitioner's California Form DE-6, Employer's Quarterly Wage Reports.

In response, the petitioner indicated that the beneficiary would be taking on even more responsibilities than described initially. The petitioner indicated that the beneficiary's revised duties would "include increased day-to-day authority and control over [its] growing local sales division as well as the expanded discretion over basic functions [sic] the sales division (including selection of sales contract employees) as well as the service division." The petitioner noted that the beneficiary "already enjoys senior level authority and decision making capacity within the Service Division including authority to hire and fire employees if needed, negotiate contractual relations with service providers, automobile, and automobile parts and inventory purchasing requirements, pricing determinations within the service department for general public, advertising and development of promotional campaigns for this division."

The petitioner also included a copy of the letter in support of its petition for the beneficiary's classification as a nonimmigrant, intracompany transferee (L-1A). The petitioner listed the beneficiary's duties for the petitioner as:

1. Planning and developing policies and objectives for the Service Department;
2. Directing legal affairs of the Service Department;
3. Directing and supervising marketing operations of the Service Department;
4. Pricing of the services to be provided;
5. Evaluating our distribution base to ensure that we have thorough coverage throughout our markets;
6. Supervising the Service Department's financial matters;
7. Initiating contracts with manufacturers of U.S. automobiles and automotive parts and accessories in the Southern California area; and
8. Serving as a liaison with [the overseas entity].

The petitioner also provided its organizational chart depicting two employees, the president of the petitioner and the beneficiary as the service manager. The petitioner also submitted its California Form DE-6 for the quarter ending September 30, 2001. The California Form DE-6 confirmed the employment of these two individuals although the president of the company was not compensated.

The director determined that the petitioner had not provided sufficient documentation to establish that the beneficiary would either supervise other managers or individuals in professional positions, or manage or direct the management of a function,

department subdivision, or component of the petitioning organization. The director determined instead that it appeared the beneficiary would be involved in the performance of routine operational activities of the petitioner.

On appeal, counsel for the petitioner asserts that the general manager directs the service department of the petitioner. Counsel asserts that the repair function of the petitioner is a crucial element in the petitioner's achievement of gross sales of \$650,000. Counsel further asserts that the "company effects repairs through contractors, [who] have replaced fixed employees." Counsel asserts that the use of contractors allows the beneficiary's primary focus to be on managerial planning and duties. Counsel refers to the previously submitted balance sheet that noted the petitioner's gross sales and previously submitted invoices. Counsel asserts that invoices previously submitted demonstrate the petitioner's use of contractors.

Counsel's assertions are not persuasive. As noted above, counsel's assertions do not constitute evidence. See *Matter of Obaigbena*, supra. Moreover, the petitioner has not provided documentary evidence that it employs the use of contractors in its service business. The AAO takes note of the invoices submitted; however, a review of the invoices does not evidence the employment of contractors. Several invoices from the petitioner are to other entities and the description of services apparently performed by the petitioner is for a "management fee." It is unclear how these invoices support the use of contractors in the petitioner's business.

The petitioner's description of the beneficiary's duties for the petitioner also does not enlighten the Bureau regarding the beneficiary's actual daily duties. In addition to borrowing phrases from the definition of "executive capacity," many of the beneficiary's duties are more indicative of an individual performing the necessary operational tasks of the petitioner. See section 101(a)(44)(B)(ii) of the Act and *Matter of Church Scientology International*, supra. The beneficiary performs the pricing function, evaluates the petitioner's distribution base, and initiates contracts with other manufacturers. Further, the petitioner has not provided evidence of employees who actually perform marketing or financial operations. Again, going on record without documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, supra. It is not apparent from the record that the petitioner has other employees to perform these duties thereby relieving the beneficiary from performing these basic duties.

The petitioner has not established that the beneficiary has been or will be performing in an executive or managerial capacity for the petitioner.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.